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No. 81-2386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP DELCOSTELLO,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL.,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF LOCAL 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, IN OPPOSITION

BERNARD W. RUBENSTEIN, ESQUIRE,
CARL S. YALLER, ESQUIRE,
EDELMAN AND RUBENSTEIN, P.A.,
Ten Light Street, Suite 2400,
Baltimore, Maryland 21202,
(301) 752-6160,
Attorneys for Respondent,
Local 557, International
Brotherhood of Teamsters.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals properly concluded that Maryland's limitations period for actions seeking to vacate arbitration awards should apply to both employers and labor representatives in a post-arbitration fair representation action?

2. Whether the Court of Appeals erred in refusing to apply the limitations period for filing unfair labor practice charges under the National Labor Relations Act, when Petitioner declined to raise that contention before the District Court and such application by the Court of Appeals would not have altered its result?

3. Whether the Court of Appeals erred in refusing to limit the effect of United Parcel Service v. Mitchell, 451 U.S. 56 (1981) to prospective matters?

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OPINIONS BELOW

The initial opinion of the district court (Pet. B3-B15) is reported in 510 F.Supp. 716. The subsequent opinion of the

district court (Pet. B16-B29) which is the subject of the instant Petition is reported in 524 F.Supp. 721. The opinion of the court of appeals (Pet. B1-B2) is unpublished, but reported in 679 F.2d 879.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1982. The Petition was filed on June 29, 1982 and invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

COUNTERSTATEMENT OF THE CASE

Petitioner Philip Delcostello was terminated by Anchor Motor Freight, Inc. (Anchor) in June, 1977 after refusing an order. The termination was grieved in accordance with the collective bargaining agreement between Anchor and Local 557, International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America (Local 557). Unable to arrive at an amicable resolution of the issue, Local 557 submitted the matter for resolution by the Eastern Conference Automobile Transporters Joint Committee (Joint Committee). A final and binding arbitration award upholding Petitioner's termination was issued by the Joint Committee on July 19, 1977.

One month later a Business Agent of Local 557 sent Petitioner a copy of the minutes of the arbitration hearing, and advised Petitioner that they were to be submitted for approval at a scheduled meeting of the Joint Committee, in a manner similar to that by which corporate business minutes are submitted for approval. Petitioner responded by a letter dated September 14, 1977 asserting dissatisfaction with the grievance process, but making no request for a rehearing of his case.

Although possessing all information necessary to initiate his lawsuit by August 20, 1977, 524 F.Supp. at 722, Petitioner waited until March 16, 1978 to file an action. His Complaint, which in effect seeks to vacate the July, 1977 Joint Committee award, was filed more than seven (7) months after the award became final.

Respondents Local 557 and Anchor moved for summary judgment on grounds of limitations, inter alia. This theory was premised on Maryland's thirty day period for vacation of arbitration awards. Md. R.P.E4; Md. Cts. & Jud. Proc. Code Ann. §3-224. The district court rejected these positions, 510 F.Supp. at 720, but noted that the same limitations issue was pending before the Supreme Court.

When the Court resolved the limitations issue in United Parcel Service, Inc.

v. Mitchell, 451 U.S. 56 (1981), both Respondents urged the district court to reconsider its earlier ruling in light of Mitchell. Petitioner's response challenged the retroactive application of Mitchell, application of Mitchell to Local 557 and the reasonableness and constitutionality of a thirty day limitations period. Petitioner declined to raise any contention concerning adoption of the limitations period utilized for unfair labor practice charges under the National Labor Relations Act and that issue was not considered by the district court. The district court held that Mitchell could be retroactively construed to apply to the case at bar and that Maryland's thirty day period for vacation of an arbitration award was the controlling limitations period governing claims against both Respondents.

Petitioner subsequently appealed the judgment to the Court of Appeals for the

Fourth Circuit. On appeal, Petitioner reiterated many of his arguments made below and added the contention that 29 U.S.C. §160(b) [Labor Management Relations Act of 1947, as amended, §10(b)] should govern limitations in fair representation actions arising under 29 U.S.C. §185 [Labor Management Relations Act of 1947, as amended, §301]. The Fourth Circuit gave no consideration to that issue in affirming the lower court's judgment.

SUMMARY OF ARGUMENT

Certiorari should be denied. The ruling of the Fourth Circuit Court of Appeals is in harmony with this Court's Mitchell doctrine. Application of a state's limitations period for vacation of arbitration awards to a labor organization was contemplated and intended by the Court. The issue of application of the limitations

period governing actions under the National Labor Relations Act is not properly presented before the Court. Finally, there is no conflict of authority between the circuit courts of appeal on the issue of retroactive application of Mitchell.

ARGUMENT

I. MITCHELL IS APPLICABLE TO UNIONS DEFENDING POST-ARBITRATION FAIR REPRESENTATION ACTIONS

Petitioner ignores the plain language of the Court's opinion by contending that Mitchell offers a limitation defense to employers, but not labor organizations. Unfortunately, this misinterpretation is shared in the holding of one circuit court of appeals, Flowers v. Local 2602 of United Steelworkers, 671 F.2d 87, 90 (2d Cir. 1982), petition for cert. filed sub nom. United Steelworkers of America v. Flowers, 51 U.S.L.W. 3006 (U.S. Jul. 1, 1982)

(No. 81-2408), and the dicta of another. Edwards v. Sea-Land Service, Inc., 678 F.2d 1276, 1284 (5th Cir. 1982).[1] If the Court determines that this conflict warrants resolution, its efforts should be limited to reversing the Second Circuit's decision in Flowers.

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1. Petitioner incorrectly argues that Sear v. Cadillac Auto Co. of Boston, 654 F.2d 4 (1st Cir. 1981) and Davidson v. Roadway Exp., Inc., 650 F.2d 902 (7th Cir. 1981) join in this misconstruction of Mitchell. The Sear court considered the question, but determined that it would not decide the limitations issue since it could base its ruling on other considerations. 654 F.2d at 7. The Davidson court merely questioned the applicability to unions of 29 U.S.C. §160(b), 650 F.2d 904, n. 2, an issue which did not confront that court.

Several circuit courts have interpreted Mitchell as applying to unions. Badon v. General Motors Corp., 110 LRRM 2562, 2565 (6th Cir. May 25, 1982); Singer v. Flying Tiger Line Inc., 652 F.2d 1349, 1353 (9th Cir. 1981). Cf. Service Emp. Intern. Union, Etc. v. Office Ctr., Etc., 670 F.2d 404, 408, n. 7 (3rd. Cir. 1981).

In Mitchell the Court was confronted with the task of selecting the most appropriate state limitations period to be applied to an employee's post-arbitration §301 action, as required by Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704-705 (1966). The employee had initiated the case against both his employer and union, but only the employer was before the Court.[2] In concluding that New York's statute of limitations for vacation of ar-

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2. Pursuant to Rule 19.6 of the Revised Rules of the Supreme Court of the United States, the union filed a brief in support of the Petitioner employer. 451 U.S. at 57. Additionally, the only amici curiae briefs were filed on behalf of the American Federation of Labor and Congress of Industrial Organizations and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. 451 U.S. at 57-58.

bitration awards was applicable to §301 fair representation actions, the Court used an analysis which was dependent upon its applicability to unions.

The Mitchell respondent had argued that New York's six year limitations period for breach of contract should apply. The Court rejected this thrust, pointing out that an employee's mere proof of violation of the collective bargaining agreement was not enough to afford relief in a §301 action. Rather, in order to prevail against either the employer or union, the employee had to demonstrate breach of duty of fair representation by the union. That additional element made such a suit more closely analogous to an action to vacate an arbitration award than to a normal breach of contract case. 451 U.S. at 62.

The required proof of unfair representation rendered such litigation a con-

struct of "labor law" rather than an offspring of traditional contract law. Accordingly, the primacy of the federal labor policy of "rapid disposition of labor disputes", Hoosier Cardinal, supra, 83 U.S. at 707, directed the Court to select the shorter limitations period. 451 U.S. at 63.

In the instant matter, Petitioner is charged with the requirement of demonstrating that Local 557 breached its duty of fair representation toward him. Petitioner may not obtain any remedy against either his former employer or union absent proof of the union's wrongful conduct. The instant litigation is therefore a creature of labor law, for which rapid disposition is essential.

This national labor policy applies with equal force to all participants within the

the labor relations process. The contrary result, as urged by Petitioner, would leave unsettled questions concerning appropriate methods for grievance handling by unions for prolonged periods.[3] Unions would be left in extended limbo, unable to verify that their conduct would not be subject to legal challenge.

Employees reap few discernable benefits from maintaining unions as parties in

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3. Absent application of the state statute of limitations for vacation of arbitration awards to unions, federal courts would again choose between either state tort or contract limitations periods. Note Statutes of Limitations Governing Fair Representation Action Against Union When Brought with Section 301 Action Against Employer, 44 Geo. Wash. L. Rev. 418 (1976); R. Gorman, Basic Text on Labor Law at 724-25 (1976). These state statutes are normally of much greater duration than those governing actions to vacate an arbitration award. 451 U.S. at 63, n. 5.

representation cases where employers have been dismissed (as in Flowers). Since an employee's damages are normally created by the employer's breach of contract, the employer and not the union is liable for those losses. Vaca v. Sipes, 386 U.S. 171, 195-198 (1967); Bowen v. United States Parcel Service, 642 F.2d 79 (4th Cir. 1981), cert. granted, 50 U.S.L.W. 3465 (U.S. Dec. 8, 1981) (No. 81-525). The system of industrial justice would not be advanced by a limitations system which distinguished between parties to a collective bargaining agreement, yet afforded no remedy against the party left to defend the other's actions.

The Fourth Circuit and district court properly followed the Court's reasoning in Mitchell. That reasoning compels application of Mitchell's limitation doctrine since "the nature of the cause of

action, not the identity of the defendant . . . controls the choice of limitation statutes". Walsh v. Boss Linco Lines, Inc., 537 F.Supp. 363, 364 (D. N.J. 1981). Utilizing state statutes of limitations for vacation of arbitration awards establishes uniformity within a particular proceeding, furthers the national labor policy favoring rapid resolution of work-place disputes and does not deprive employees of substantive rights. If the Court is desirous of emphasizing these policies, it should correct the error of the Flowers court, while leaving the Fourth Circuit's decision undisturbed.

II. THIS CASE DOES NOT OFFER THE COURT AN APPROPRIATE OPPORTUNIT TO CONSIDER THE APPLICABILITY OF 29 U.S.C. §160(b)

In an amicus curiae brief filed in Mitchell, the American Federation of Labor and Congress of Industrial Organizations

urged the Court to adopt the six month limitations period of §10(b) of the National Labor Relations Act in §301 fair representation cases. The Court refused to adopt this theory, noting both that it had not been raised in the case and that the action was commenced outside both the statutory six month limitations period and New York's ninety day period. 451 U.S. at 60, n. 2. Those same shortcomings are present in the instant case, so that a grant of certiorari would not allow the Court to appropriately consider this issue.

In replying to the Joint Motion for Reconsideration filed in the district court by Local 557 and Anchor, Petitioner argued, inter alia, that Maryland's thirty day limitations period was unconstitutional

because it was unreasonably short.[4] Petitioner recognized that Mitchell had approved New York's ninety day limitations period, but contended that Maryland's thirty day period offered an insufficient time in which to prepare a lawsuit challenging a detrimental arbitration ruling. Petitioner asserted that although "it would be presumptuous to expect this Court to promulgate a new national policy establishing six month limitations for all 301 actions, it is quite appropriate for the

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4. Although it was pressed before the district court, Petitioner has abandoned this constitutional question. By contrast, Petitioner was silent before the district court but now argues that the Maryland Arbitration Act is expressly inapplicable to labor disputes. The thirty day limitations period is found in Md. Cts. & Jud. Proc. Code Ann. §3-224. The exclusion from the Maryland Arbitration Act of labor matters is remedied by Maryland Rule of Procedure E4. That Rule applies the procedural framework of the Act to arbitration matters for which the Act is inapplicable.

Plaintiff to assert that the thirty day limitation period is unreasonably short". (Brief of Plaintiff in Support of its Answer to Motion for Summary Judgment, filed May 27, 1981, at 29.) Since it was not confronted with the §10(b) issue, the district court gave it no mention in either of its opinions. In affirming, the circuit court made no mention of §10(b). Where opinions of the district court and circuit court are devoid of any reference to a particular issue, as here, the Court has held that it would not consider it in the first instance. Ramsey v. Mine Workers, 401 U.S. 302, 312 (1971).

Even if Petitioner had preserved his §10(b) contention, it would be unavailing. Petitioner initiated this litigation on March 16, 1978, seven months after he was aware his termination had been upheld in arbitration. Petitioner seeks to avoid the

consequences of his delay by arguing that limitations were tolled until December, 1977.

In support of this position, Petitioner distorts the opinion of the district court. The district court did not decide the issue of tolling of limitations, since the action was not filed until Maryland's thirty day period had run. Thus, even assuming Petitioner's tolling argument was meritorious, the action was untimely filed. 524 F.Supp. at 723. Since Petitioner failed to argue the applicability of §10(b), the district court was not required to decide whether or not limitations were tolled.

Applicability of §10(b) to §301 fair representation cases is an interesting issue which this Court may eventually decide. However, the instant Petition suf-

fers from dual defects which render it a poor choice for disposition of that question.

III. MITCHELL SHOULD NOT BE LIMITED TO PROSPECTIVE APPLICATION

Petitioner argues that a conflict exists between the circuit courts of appeal concerning the retroactive application of Mitchell. Since certiorari is denied absent "principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal", Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923), careful scrutiny of that alleged conflict is warranted.

Singer v. Flying Tiger Line Inc., 652 F.2d 1349 (9th Cir. 1981), involved the claim of an airline flight engineer that he

should have been given the opportunity to become a co-pilot. More than one year after an unsuccessful third arbitration proceeding, he filed suit against both his employer and union. Although California has a one hundred day limitations statute for vacation of arbitration awards, Cal. Civ. Proc. Code §1288, neither defendant advocated its applicability before the district court. Accordingly, the Singer court held that adoption of the short limitations period would be inappropriate. 652 F.2d at 1353. The court only considered the issue of retroactive application of Mitchell as an afterthought, and absent briefs on this issue.[5] The Singer court went on to grant

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5. Mitchell was decided after all briefs had been filed in Singer. 652 F.2d at 1353. It is not apparent from the Singer opinion whether any party orally advocated the applicability of Mitchell.

summary judgment to the defendants on other issues. 652 F.2nd at 1356.

The Singer court's consideration of retroactive application of Mitchell was not decisive of its ultimate conclusion. Its discussion of the issue is mere dicta, and lacks the analysis offered in the instant case. See 524 F.Supp. at 722-724.

A conflict between the circuit courts of appeal warranting a grant of certiorari should be premised upon irreconcilable holdings. Such a conflict is not presented by distinguishable dicta, such as is offered in Singer. 524 F.Supp. at 724.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Bernard W. Rubenstein
Carl S. Yaller
Edelman and Rubenstein, P.A.
Ten Light Street, Suite 2400
Baltimore, Maryland 21202
(301) 752-6160
Attorneys for Respondent,
Local 557, International
Brotherhood of Teamsters